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No. 79-1259

In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD TORCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the district court erred in refusing to suppress business records relating to his distribution of obscene materials, on the ground that a warrant authorizing seizure of these records was not sufficiently specific.

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on five counts of interstate transportation of obscene motion picture films for

the purpose of sale and distribution, in violation of 18 U.S.C. 1465. He was sentenced to concurrent terms of three years' imprisonment on each count, with 30 months suspended in favor of probation. During the probationary period, petitioner will be required to perform services for an appropriate social organization one-half day per week. Petitioner was also fined $500. The court of appeals affirmed (Pet. App. A3-A12; 609 F.2d 1088).

1. The pertinent facts, as summarized by the court of appeals (Pet. App. A4-A5), are not in dispute. Petitioner was employed as a salesman for a Pittsburgh, Pennsylvania company engaged in supplying sexually explicit materials to retail outlets. On February 11, 1977, petitioner telephoned the owner of a retail outlet in Charleston, West Virginia to discuss a possible sale; the owner expressed an interest in purchasing a film entitled "Dog Fucker." Four days later, petitioner delivered to the outlet two cartons containing copies of that film as well as other sexually explicit magazines and films. The owner subsequently permitted an FBI agent to examine the contents of the cartons and to take copies of the magazines and films to a federal magistrate. The magistrate, after viewing certain of the magazines and films, determined that there was probable cause to believe they were obscene and issued warrants to search petitioner's person and his truck. The warrants authorized seizure of (Pet. App. A4-A5):

> records, documents, and writings related to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films, including route book, billing invoices, cash sales slips, credit memos, and other similar type documents, together with copies of lewd, lascivious, and filthy films and magazines, including a film labeled "Dog Fucker."

The warrants were executed the day they were issued, one day after petitioner had delivered the materials to the West Virginia outlet.

2. Petitioner moved to suppress the materials seized pursuant to the warrants. After an evidentiary hearing, the district court suppressed all of the magazines and films other than the film specifically named in the warrants, but declined to suppress that film and the business records (Pet. App. A13-A17). The court found that, except for the named film, the affidavits failed either to describe in sufficient detail the contents of the magazines and films to be seized, or to identify those items with particularity; the court believed that, as to these unidentified items, the warrants impermissibly left to the officers conducting the search the responsibility for determining which items in fact were obscene (*id.* at A15). The court also ruled, however, that the magistrate had properly found probable cause to believe that the magazines and films he viewed were obscene, and that petitioner had business records pertaining to the interstate transportation of those materials on his person and in his truck (*id.* at A14). On that basis, the court refused to suppress the records.

3. Petitioner contends (Pet. 6-10) that a warrant authorizing the seizure of business records relating to the interstate distribution of obscene materials must satisfy the same standards as a warrant for the obscene materials themselves. The court of appeals correctly rejected this contention in an opinion (Pet. App. A5-A9) on which we essentially rely.

The portion of the warrants authorizing seizure of the business records specified that the area to be searched was petitioner's person and truck, and that the items to be seized were "records, documents and writings * * *, including route book, billing invoices, cash sales slips, credit memos, and other similar type documents" relating to the distribution of obscene films. The courts below concluded (Pet. App. A6, A15) that greater particularity was required in the warrants' description of the obscene materials because those items were arguably communicative in nature and thus subject to special safeguards imposed by the First Amendment upon the seizure of books and other expressive materials that are in the process of distribution or exhibition. See *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973). Because the seizure of "arguably protected" materials constitutes at least a minimal interference with their public circulation (see *Heller* v. *New York*, 413 U.S. 483, 493 (1973)), only those specifically identified expressive materials whose probable obscenity has previously been determined by a neutral magistrate may be seized; an ad hoc determination of which items are probably obscene and which are protected cannot be

left to the officer executing the warrant. See *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325 (1979). These First Amendment considerations, however, do not apply to business records pertaining to allegedly obscene materials, since the seizure of such records in no way limits the public's access to the materials themselves. *United States* v. *Jacobs*, 513 F.2d 564, 567 n.3 (9th Cir. 1974). See *Stanford* v. *Texas*, *supra*, 379 U.S. at 485 n.16.

After viewing certain of the films that petitioner had delivered to the West Virginia store, the magistrate determined that there was probable cause to believe that the films were obscene and that petitioner had violated 18 U.S.C. 1465 by transporting the films in interstate commerce for the purpose of sale or distribution.[1] Under traditional Fourth Amendment standards, the warrants, which directed the search for and seizure of business records that constituted evidence of that crime, were adequate to enable the executing officers reliably to distinguish the documents to be seized. See *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976); *United States* v. *Cor-*

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[1] Because the magistrate made a determination of obscenity prior to issuing the warrants, it is irrelevant, insofar as the seizure of the business records is concerned, that the officer executing the warrants for records relating to the interstate transportation of "lewd, lascivious and filthy films" conceded at the suppression hearing that he did not know what the terms "lewd and lascivious" meant (Pet. 9).

tellesso, 601 F.2d 28, 33 (1st Cir. 1979), cert. denied, No. 79-724 (Feb. 19, 1980).

4. Petitioner argues (Pet. 10-12) that even if the business records and the one specified film were described with adequate particularity, the generalized description of the remaining films and magazines rendered the warrants—and hence the seizures—illegal in their entirety. His thesis is that the Fourth Amendment requirement of particularity was designed to prevent a general exploratory rummaging in a person's belongings, and that vindication of this purpose requires invalidating in its entirety a warrant that authorizes such a rummaging regardless of whether there is also language in the warrant authorizing a narrower search. We disagree.[2]

There is no reason to suppress items properly described in a warrant simply because other items were not described in sufficient detail. As several courts have recognized, the deterrent purpose of the exclusionary rule would not be served by requiring the suppression of items properly seized under the authority of a warrant on the ground that the seizure was part of the same search in which an illegal seizure occurred. See, *e.g.*, *United States* v. *Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *United States* v. *Mendoza*, 473 F.2d 692, 697 (5th Cir. 1972). Petitioner's argument for wholesale suppression in this

[2] We also note that petitioner did not raise this claim below, and, accordingly, absent exceptional circumstances, he should not be permitted to do so for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

case has even less to commend it than the argument rejected in *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978), where this Court held that the inclusion of deliberately false statements in an affidavit supporting a search warrant would not invalidate the entire affidavit if it were otherwise sufficient.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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